IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-866

VORNADO, INC. t/a TWO GUYS, *et al.*,[1]

Appellants,

vs.

JOHN J. DEGNAN, ATTORNEY GENERAL OF NEW JERSEY, *et al.*,

Appellees.

On Appeal from the Supreme Court of New Jersey

MOTION TO DISMISS OR AFFIRM

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Appellee, City of Hackensack, a municipal corporation of the State of New Jersey, pursuant to Rule 16 of the Rules of the Supreme Court of the United States, moves to dismiss the appeal filed herein, or in the alternative, to affirm the judgment of the Supreme Court of New Jersey on the ground that it is apparent that the questions on which the decision of this cause depends are so insubstantial as not to warrant further argument.

I.

The State Statute Involved and the Nature of the Case.

A. The Statute

This appeal attacks the validity of N.J.S.A. 2A:171-5.8 through 5.18, the New Jersey "Sunday Closing Law".

This statute prohibits the sale on Sunday, except as works of necessity or charity dissasociated with the business of the participant, of clothing and wearing apparel, furniture, building and lumber supply materials, home or business or office furnishings, household and business or office appliances. Pursuant to N.J.S.A. 2A:171-5.12, adoption *vel non* of the statute is left to county-wide referendum and, at present, the Act is effective in ten of the twenty-one New Jersey counties ("Closed Counties"). Violations are deemed disorderly persons and upon conviction are subject to fines graduated from $25.00 for the first offense to a maximum of $500.00 for the fourth and each subsequent offense or, in the discretion of the Court, imprisonment for not less than 30 days or more than six months.

B. The Proceedings Below

The Appellant, Vornado, Inc., trading as "Two Guys", operates 27 full-line multi-department discount stores in the State of New Jersey. Twenty of these stores are located in Closed Counties. The individually named Appellants are managers and assistant managers of Two Guys stores and were named nominal parties plaintiff below.

On Sunday, December 25, 1975, Vornado management directed its employees in Closed Counties to expose for

sale and sell all types of merchandise in violation of the Sunday Closing Law. That action resulted in prosecutions by the six Appellee municipalities.

Appellant asserts that its due process and equal protection rights secured by the Fourteenth Amendment to the United States Constitution are infringed upon by application of the Sunday Closing Law. More specifically, Appellant contends that the classifications established in the statute which set forth what may or may not be sold lack a rational relationship to a valid legislative purpose, that the law cannot be enforced in other than a discriminatory and selective manner, and that the classifications of proscribed items are too vague to be understood by persons of ordinary intelligence.

On January 20, 1976, Appellant instituted an action for a declaratory judgment pursuant to N.J.S.A. 2A:16-50 *et seq.*, that the New Jersey Sunday Closing Law was unconstitutional under the United States and New Jersey Constitutions and sought dismissal of the prosecutions brought thereunder. On March 10, 1977, the Honorable Sylvia B. Pressler, Judge of the Superior Court, Law Division, issued an opinion declaring the law unconstitutional and permanently enjoining the pending prosecutions. While an appeal was pending before the Appellate Division of the Superior Court, the Supreme Court of New Jersey granted direct certification. On July 18, 1978, the New Jersey Supreme Court in a 5-2 decision held the New Jersey Sunday Closing Law to be constitutional, thereby reversing the judgment of the trial court, and ordered the complaint dismissed. 77 N.J. 347 (1978) (A-2).

II.

ARGUMENT

The case presents no substantial federal question not previously determined by this Court.

The decision of the Supreme Court of New Jersey in the instant case is clearly correct. To satisfy the requirements of the United States Constitutional standard of "Equal Protection", a legislative enactment must bear some rational relationship to the "evil" sought to be reached by that enactment. *Railway Express Agency* v. *New York,* 336 U.S. 106 (1949). Equal protection of the law does not require that all evils of a particular *genus* be eradicated at the same time; a legislative body may determine a starting point. *Railway Express,* supra, 336 U.S. 110.

The Supreme Court of the United States has previously sustained the validity of Sunday closing statutes in Maryland and Pennsylvania, against attacks on various grounds including denial of equal protection secured by the Fourteenth Amendment, although both contained numerous and varied exemptions. *McGowan* v. *Maryland,* 366 U.S. 420, 81 S.Ct. 1101, 6 L.Ed. 2d 393 (1961); *Two Guys from Harrison-Allentown* v. *McGinley,* 366 U. S. 582, 81 S.Ct. 1135, 6 L.Ed.2d 551 (1961). Referring to the equal protection clause of the Fourteenth Amendment, the Court in *McGowan* stated:

> The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State objective. State Legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their law results in some inequality. A statutory discrimination will not be set aside if any set of facts

> reasonably may be conceived of to justify it. 366 U.S. at 425-426.

The Supreme Court of New Jersey correctly applied these principles to the record below and found several legislative concerns which were in fact furthered by the Sunday Closing Law. 77 N.J. 347, 357-361.

Appellant's contention that the classifications of proscribed items within the Sunday Closing Law are unconstitutionally vague is a non-justiciable issue within the meaning of Article III of the Constitution. Although Appellant's Jurisdictional Statement attempts to point out ambiguities in the statutory scheme, the record below is barren of any proof regarding the character of the items the sale of which triggered the prosecutions in question. Additionally, the Courts below considered this argument and found it to be without basis in fact (A-1, 20a; A-2, 41a).

Finally, Appellant argues that selective and discriminating enforcement of the Sunday Closing Law renders that act unconstitutional. Although raised below by Appellants, the contention that the statute is incapable of enforcement in other than a discriminatory and selective manner, was held factually unsupported by the Courts below (A-1, 21-22a; A-2, 42a). The polestar case in the area of selective enforcement is *Yick Wo* v. *Hopkins,* 118 U.S. 356 (1886). In that case, the Court held that where discriminatory enforcement against a particular class of persons is proved, equal protection of the laws, as guaranteed by the Fourteenth Amendment to the United States Constitution has been denied. The relief to be granted in such cases is dismissal of the prosecutions brought against those denied equal protection. Appellants' argument that upon proof of selective enforcement, the statute itself must be invalidated, is without support in law. In fact, Appellant cites no authority in support of that position.

In light of the foregoing, it is readily apparent that prior decisions of this Court foreclose the arguments Appellant seeks to raise under the Federal Constitution and are conclusive and determinative as to the absence of a substantial Federal question. *Zucht* v. *King*, 260 U.S. 174 (1922). *Equitable Life Assurance Society* v. *Brown*, 187 U.S. 308, 311 (1902).

III.

CONCLUSION

WHEREFORE, Appellee, City of Hackensack, respectfully submits that the questions upon which this cause depends are so insubstantial as not to require further argument, and Appellee respectfully moves to dismiss this appeal or in the alternative, to affirm the judgment entered in this cause by the Supreme Court of New Jersey.

Respectfully submitted,

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